# Anti-Trust Legislation and Litigation

Annual Address

*before the*

American Bar Association

*by*

WILLIAM B. HORNBLOWER
of New York

Delivered at Boston, Massachusetts, August 30, 1911

# ANTI-TRUST LEGISLATION AND LITIGATION.

ANNUAL ADDRESS BY

WILLIAM B. HORNBLOWER,

OF NEW YORK.

Twenty-one years ago Congress passed the so-called "Sherman Anti-Trust Law."

This designation of the law is a misnomer. The law as it stands is not attributable to Senator Sherman, nor is the law properly called an "anti-trust law."

Senator Hoar says in his Autobiography that this law is called the Sherman Act "for no other reason that I can think of except that Mr. Sherman had nothing to do with framing it whatever" (Vol. II, p. 363).

The word trust acquired an unenviable prominence in the eighties and became the familiar and common expression for a combination of competing interests under one management. Today, and for many years past, the so-called trust in its original sense has become rare, but the expression survives and has assumed a generic significance as indicating and connoting every form of combination of competing interests. The original trust arrangement was, as will be remembered, an arrangement whereby a number of competing manufacturers, individual or corporate, while retaining their individual or corporate identity and their individual or corporate ownership of their respective properties, put into the hands of trustees their respective interests, the trustees being clothed with the right to dictate to the respective competitors the terms on which they should compete, the amount and character of their ouput and the prices at which the output should be sold. The term trust soon became a term of opprobrium and has so remained. The large combinations of capital which now exist in various branches of industry have inherited the opprobrium attaching to this term. To call a

combination or a corporation a trust is to excite public condemnation and to put the combination or the corporation on the defensive.

The statute passed in 1890 by Congress is entitled, "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies." We still for purposes of convenience continue to call the law the Sherman Anti-Trust Law, although it is not the Sherman Law as originally reported by the Finance Committee of the Senate of which Senator Sherman was chairman and although it is not particularly directed against trusts, but is directed generally against contracts or combinations or conspiracies in restraint of trade and also against monopolizing.

This law was carefully framed, amended and re-amended and was debated in detail by the ablest lawyers in Congress, some of the ablest lawyers who ever sat in that body, including such men as Senators Edmunds, of Vermont, and George F. Hoar, of Massachusetts. One would have supposed that if ever a statute would prove to be unambiguous, intelligible and enforceable, this would be that statute; yet it is safe to say that no statute ever passed since the foundation of the government has been the subject of more difference of opinion or the cause of more perplexity, both to judges and lawyers, than this same statute. Three times have the justices of the United States Supreme Court been divided in opinion on the question of its construction; twice by a vote of five to four and once by a vote of five to three.

In its latest phase, the question of construction has been the occasion for a most violent and impassioned dissent by the senior justice of the court from the views expressed by the Chief Justice, concurred in by all the associate justices, except the senior justice, who in his dissenting opinion has accused his brethren of judicial legislation and of practically nullifying the will of Congress as expressed in the statute and of reversing their previous decisions.

The reason why the eminent and able lawyers who framed this statute failed in their attempt to enact a law which should be clear and unambiguous, is a reason which inheres in all

attempts to provide for a large class of cases by statutory enactment. The principles of the common law grow by a process of organic growth. The law slowly develops and enlarges to meet actual cases and existing situations. The law is made by applying principles of morality and public policy and sound reason to a given state of facts. On the other hand, law-making by legislation must undertake to deal with a vast number of complicated situations thereafter to arise, and must deal with such situations either by very general phraseology which will be dangerous when applied to all possible cases coming within the apparent meaning of the language or else it must go into great detail and deal with the subject matter in its various phases.

With regard to the subject matter attempted to be covered by the Sherman Law, there were peculiar difficulties and dangers.

As I have pointed out on a prior occasion, the requisites of a proper statute are:

(1) That its language should be capable of application to all cases covered by such language construed in its ordinary and natural sense;

(2) That it should be applicable to all persons and corporations coming within its terms without arbitrary discrimination;

(3) That it should be clear and certain in its provisions so that all persons can be guided thereby.

This statute fails to comply with any one of these requisites.

The first section of the act provides that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal."

The phrase contracts "in restraint of trade," as used in the common law decisions, primarily had reference to contracts by which a merchant or manufacturer agreed to sell to a competitor in the same line of business the goodwill of his business, such sale to be accompanied by a covenant on the part of the vendor to refrain from competition. Such contracts were originally held to be void as against public policy because necessarily restraining trade. The leading case on this subject is Mitchel *vs.* Reynolds, 1. P. Wms. 181. Gradually, however, such

contracts came to be recognized as valid in cases where the convenant to refrain from competition was limited in time and space so as to be not an unreasonable restriction or as the courts sometimes stated it, a restriction no greater than was necessary in order to protect the vendee in the right to the use of the property purchased by him, or as it was otherwise put, a contract "in partial restraint of trade" as distinguished from a contract "in general restraint of trade." It was with regard to such contracts that the words *reasonable* and *unreasonable* came to be used and contracts in reasonable restraint of trade, were sustained by the courts, while contracts which were in unreasonable restraint of trade were condemned by the courts. The test of what is a reasonable or an unreasonable restraint of trade has been gradually liberalized by the courts from time to time until now, as laid down by the Court of Appeals of New York in the Diamond Match Case (106 N. Y. 473), and by the House of Lords in England in the Nordenfelt Case (L. R. (1894) Appeal Cases, 535), a covenant by a vendor to refrain from competition is valid even though practically unrestricted as to time and space, provided it is necessary for the protection of the vendee that an unrestricted covenant should be made.

There were, however, other classes of contracts which came within the condemnation of the common law as "in restraint of trade," such as contracts between competitors to regulate prices or to prevent competition among themselves or by rivals. These classes of contracts were held to be illegal as tending to raise prices or to create a monopoly by limiting competition. These classes of contracts were evidently intended to be covered by the statute.

Manifestly, however, if the statute were to be construed literally as declaring "every" contract in restraint of trade to be illegal and if that phrase were to be construed as meaning that every contract which *actually* restrains trade or competition shall be illegal, not only would it run counter to the common law, but it would be practically meaningless and unenforceable. This is clearly pointed out by Judge Lacombe in delivering his opinion in the Tobacco Case where he uses the

striking and telling example of a contract between "two individuals who have been driving rival express wagons between villages in two contiguous states, who enter into combination to join forces and operate a single line." As Judge Lacombe well points out, such combination operates to "restrain an existing competition" (164 Fed. Rep. 702). This of course amounts to a *reductio ad absurdum,* the only escape from which is to say, as has been said by some of the defenders of the literal construction of the law, that the law was not designed and will not be interpreted by the courts to apply to trifles. The suppression, however, of competition between two rival expressmen may be as important to a small community as the suppression of competition between two great railroad systems is to a large community.

The objections to Section 1 of this act were emphatically pointed out by no less a person than President Roosevelt. In his annual message to Congress under date of December 8, 1908, he said:

"I believe that it is *worse than folly* to attempt to prohibit *all* combinations as is done by the Sherman Anti-Trust Law, because such a law can be enforced only *imperfectly* and *unequally,* and its enforcement works almost as much hardship as good."

The second section of the act—with regard to "monopolizing," is equally incapable of a literal interpretation or a literal enforcement. This section reads: "Every person who shall monopolize, or *attempt to monopolize,* or combine or conspire with any other person or persons to monopolize, *any part* of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

The absurdity of this section if literally construed and enforced is well pointed out by Judge Ward in his dissenting opinion in the Tobacco Case in the U. S. Circuit Court (164 Fed. Rep. 727):

"As this section prohibits a monopoly of or an attempt to monopolize any *part* of such commerce, it cannot be literally construed. So applied, the act would prohibit commerce altogether."

The same criticism is forcibly made by Judge Sanborn in delivering the opinion of the court in Whitwell *vs.* The Continental Tobacco Co., 125 Fed. Rep. 454:

"But is every attempt to monopolize any *part* of interstate commerce made unlawful and punishable by Section 2 of the Act of July 2, 1890, C. 647, 26 Stat. 209? If so, no interstate commerce has ever been lawfully conducted since that act became a law, because every sale and every transportation of an article which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation. An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. Eradicate it, and competition necessarily ceases—dies. Every person engaged in interstate commerce necessarily attempts to draw to himself, and to exclude others from, a part of that trade; and, if he may not do this, he may not compete with his rivals, and all other persons and corporations must cease to secure for themselves any part of the commerce among the states, and some single corporation or person must be permitted to receive and control it all in one huge monopoly."

In fact this statute never has been and never can be literally and strictly applied. To so apply it would produce chaos in the business world.

The statute must be applied not according to its language, but according to its reasonable meaning or else it becomes the instrument of injustice and of ruin to the mercantile community.

The phrase "restraint of trade" as used by the courts is, as I understand the cases, the equivalent of restraint of competition, that is to say, if free competition be restrained, trade is restrained.

It has been claimed with great insistence that there is a distinction between "restraint of trade" and "restraint of competition," and that the latter is not unlawful except as it results in the former, and if the restraint of competition does not in fact restrain the volume or extent of trade, there is no illegal restraint of trade, and it is further insisted that this distinction has been

recognized by the Supreme Court in its recent opinions in the Standard Oil and Tobacco cases.

With all due respect for the ability of those who support these views, I am unable to concur in their conclusions.

The common-law meaning of "restraint of trade" was certainly "restraint of competition." The numerous cases in the common law courts discussing the validity or invalidity of contracts in restraint of trade turn on the question of whether they reasonably or unreasonably interfere with free competition. As is said in the head-note to the opinion of Mr. Justice Harlan in the Northern Securities Case, 193 U. S. 198: "The Anti-Trust Act has prescribed the rule of *free competition.*" . . . . "The natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of *competition* restrains instead of promotes trade and commerce."

It is because the agreements in the *Addyston Pipe* Case (175 U. S. 211), the *Montague* Case (193 U. S. 38), and the *Swift* Case (196 U. S. 38) *restrained competition* that they were held to be in *restraint of trade,* and finally, in the *Standard Oil* Case and the *Tobacco* Case, it is because the combinations in these cases were held to unduly restrain free competition that they were held to be in *undue restraint of trade.*

It is said by Mr. Chief Justice White in the recent Standard Oil Case, speaking of the common law decisions:

"It is also true that while the principles concerning contracts in restraint of trade, that is, voluntary restraint put by a person on his right to pursue his calling, hence only operating subjectively, came generally to be recognized in accordance with the English rule, it came moreover to pass that contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to *unduly diminish competition* and hence to enhance prices—in other words, to monopolize—came also in a generic sense, to be spoken of and treated, as they had been in England, as restricting the due course of trade, and therefore as being in restraint of trade."

And again:

"The dread of enhancement of prices and of other wrongs which it was thought would flow from the *undue limitation of*

*competitive conditions* caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably *restrictive of competitive conditions,* either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy."

In stating the conclusions of the court, the Chief Justice says:

"In view of the common law and the law in this country as to the restraint of trade, which we have reviewed, and the illuminating effect which that history must have under the rule to which we have referred, we think it results: (a) That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense."

In the Tobacco Case, there was no proof that the volume of trade had been in fact restrained. On the contrary, the proof showed an enormous increase of the volume of trade and a large increase in the number of independent dealers during the existence of the American Tobacco Company, but the court held that there was an intent to restrict or suppress competition and to form a monopoly which rendered the combination obnoxious to the statute as a combination "in restraint of trade."

As one of the counsel who argued the Tobacco Case before the Supreme Court, appearing in that court in behalf of the Imperial Tobacco Company of Great Britain and Ireland, I ought to say in justice to myself and in justice to my client, so far as it was involved in the conclusion arrived at by the court, and in

justice to the American Tobacco Company, that I did not regard and do not now regard the testimony as justifying the sweeping condemnation announced by the court on the facts, or the decision arrived at by the court, even as to the American Company, much less as to the Imperial Company. I concur, however, fully in the views expressed by the court as to the construction of the statute, as I shall hereafter more fully point out.

Taking it as established that "restraint of trade" means restraint of competition, the necessity of a reasonable construction of the statute is clearly apparent.

While the maxim that "competition is the life of trade" is in a certain sense a correct proposition, yet there is a point at which competition becomes the death of trade. It may well be that two competitors, carrying on business in competition with each other, may engage in such ruinous competition by cutting prices or otherwise that one or the other must necessarily be driven to the wall. Unless therefore one or both of those competitors can protect himself or themselves by a mutual agreement involving the sale of the property of one to the other, or by a combination to regulate prices, one or the other must be forced to the wall and thus practical monopoly will result. Undue competition may thus lead to monopoly while a reasonable regulation or a reasonable arrangement between the competitors may prevent monopoly. A rigid and drastic statute overreaches itself, while a reasonable and just statute, which is readily enforceable, will accomplish beneficial results. Prohibition of all combinations and of all restraint of trade is unwise. Civilization means co-operation; co-operation means combination; combination means restraint of competition.

There has been so much misunderstanding and so much intentional or unintentional misrepresentation of the recent opinions of the U. S. Supreme Court in the Standard Oil and the Tobacco Cases and so much unjust and unfounded criticism of those opinions as an alleged departure from and repudiation of the previous decisions of the court, that a brief review of the decisions is necessary to a clear understanding of the situation.

The extremists have opened the vials of their wrath upon the court, and sarcasm, abuse and even threats have been freely indulged in by those who inveigh against what they call judicial legislation.

Let us endeavor to consider the history of the litigation calmly and dispassionately and see how far the critics are justified in their attacks on the court. I shall not hope to satisfy the radical who "sees red" or the pessimist who "thinks blue"; but I shall hope to convince the calm intelligence of the American Bar Association that there never was a more uncalled for, unwarranted or unjustified attack upon a judicial opinion.

In this review of the decisions, it is well to bear in mind what is said by Senator Hoar (Autobiography, Vol. II, p. 364), as to what was intended by its framers:

"It was expected that the court, in administering that law, would confine its operation to cases which are contrary to the policy of the law, treating the words 'agreements in restraint of trade' as having a technical meaning, such as they are supposed to have in England. The Supreme Court of the United States went in this particular farther than was expected. In one case it held that 'the bill comprehended every scheme that might be devised to restrain trade or commerce among the several states or with foreign nations.' From this opinion several of the court, including Mr. Justice Gray, dissented. It has not been carried to its full extent since, and I think will never be held to prohibit the lawful and harmless combinations which have been permitted in this country and in England without complaint, like contracts of partnership, which are usually considered harmless. We thought it was best to use this general phrase which, as we thought, had an accepted and well-known meaning in the English law, and then after it had been construed by the court, and a body of decisions had grown up under the law, Congress would be able to make such further amendments as might be found by experience necessary."

The first great legal battle over the meaning and application of the statute took place within two or three years after its enactment and was an attempt to deal with the so-called Sugar Trust and to put an end to a great and growing power of control over one of the necessaries of life. The attempt, however, to

reach the Sugar Trust was a failure. The Supreme Court held in the Knight Case (156 U. S. 1), that the statute was not intended to "assert the power to deal with monopoly directly as such; or to limit or restrict the right of corporations created by the states or the citizens of the states in the acquisition, control or disposition of property; or to regulate or prescribe the price or prices at which such property, or the products thereof, should be sold; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted." The bill in the Knight Case seems to have been drawn in such shape as to fail to sufficiently disclose that the Sugar Trust was actually carrying on the business of interstate trade or commerce in the *manufactured product.*

The next great legal battle took place in the Trans-Missouri Case and the Joint Traffic Case, both of which were instituted within two or three years after the passage of the act. It might reasonably have been expected that these cases would settle once and for all what the statute meant and what were its applications and its limitations. Unfortunately the decisions in these cases were but starting points for new uncertainties and furnished *obiter dicta* which have misled the Bench and the Bar in subsequent cases and which remained until 1911 the source of new perplexities. Both of these cases were decided by a bare majority of the court.

The prevailing opinion in the Trans-Missouri Case contained *dicta* which were understood to mean that every contract which operated in restraint of trade was invalid under the statute whether such contract was reasonable or unreasonable. The main ground of contention in that case was whether the Sherman Law applied to railroad companies engaged in interstate transportation so far as to prohibit mutual regulation by agreement of rates for transportation. The majority of the court held that it did, the minority of the court dissenting on this proposition. Incidentally the majority opinion as delivered by Mr. Justice Peckham announced the proposition that the Sher-

man Law applies to all combinations in restraint of interstate or foreign trade or commerce without exception or limitation and that the prohibitions of that section are not confined to unreasonable restraints of such trade or commerce, Mr. Justice Peckham saying in his opinion:

"It is now with much amplification of argument urged that the statute in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in unreasonable restraint of trade while leaving all others unaffected by the provisions of the act; that the common law meaning of the term 'contract in restraint of trade' includes only such contracts as are in unreasonable restraint of trade, and when that term is used in the federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof. The term is not of such limited significance."

United States *vs.* Freight Ass'n (166 U. S. 327).

It was most unfortunate that the learned justice who delivered the opinion of the court used this language which was really an *obiter dictum*. All that was really decided by the court in that case was that a contract to regulate rates made between railroad companies carrying on a public service business as common carriers, exercising public franchises, was against public policy as in restraint of trade and came within the prohibition of the Sherman Law irrespective of the question of whether the rates prescribed were reasonable or unreasonable, or whether the agreement would operate beneficially or injuriously. The circumstance that the combination between the railroad companies was capable of being operated so as to prescribe unjust or unreasonable rates was held to be sufficient to bring it within the intent of the statute, even though the actual operation of the combination was beneficial to the community.

Mr. Justice Peckham, however, followed up his *obiter dictum* by a very emphatic statement which he subsequently enlarged upon in the Joint Traffic Case and by which he carefully warned against the very construction which was subsequently placed

upon these decisions by the profession and by some of the lower courts, and even by the Supreme Court itself in subsequent cases. Thus, in the opinion of Mr. Justice Peckham as delivered in the Joint Traffic Case (171 U. S. 566), he says:

"We also repeat what is said in the case above cited that 'the act of Congress must have a *reasonable construction* or else there would scarcely be an agreement or contract among business men that could not be said to have indirectly or remotely some bearing upon interstate commerce and possibly to restrain it.' To suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri Case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or justified by the decision mentioned, or by any other decision of this court."

Mr. Justice Peckham further says:

"In dwelling upon the far-reaching nature of the language used in the act as construed in the case mentioned, counsel contend that the extent to which it limits the freedom and destroys the property of the individual can scarcely be exaggerated, and that ordinary contracts and combinations, which are at the same time most indispensable, have the effect of somewhat restraining trade and commerce, although to a very slight extent, but yet, under the construction adopted, they are illegal.

"As examples of the kinds of contracts which are rendered illegal by this construction of the act, the learned counsel suggest all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell their goods on commission; the purchase by one wholesale merchant of the product of two producers; the lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop; the withdrawal from business of any farmer, merchant or manufacturer; a sale of the good will of a business with an agreement not to destroy its value by engaging in a similar business; and a covenant in a deed re-

stricting the use of real estate. It is added that the effect of most business contracts or combinations is to restrain trade in some degree.

"This makes quite a formidable list. It will be observed, however, that no contract of the nature above described is now before the court, and there is some embarrassment in assuming to decide herein just how far the act goes in the direction claimed. Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.

"We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri Case as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vender sells his business."

Mr. Justice Peckham further states the real point decided and the only point decided as follows (171 U. S. 568):

"*The question really before us is* whether Congress, in the exercise of its right to regulate commerce among the several states, or otherwise, has the power to prohibit, as in restraint of interstate commerce, *a contract or combination between competing railroad corporations* entered into and formed for the purpose of establishing and maintaining interstate rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, *even though the rates and fares thus established are reasonable.* Such an agreement directly affects and of course is intended to affect the cost of transportation of commodities, and commerce consists, among other things, of the transportation of commodities, and if such transportation be between states it is interstate commerce. . . . .

"Has not Congress with regard to interstate commerce and in the course of regulating it, *in the case of railroad corporations,* the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has."

The learned Justice proceeds to discuss at length the nature of the franchises of a railroad, and on page 570 says:

"We do not think, when the grantees of this public franchise are *competing railroads* seeking the business of transportation of men and goods from one state to another, that ordinary freedom of contract in the use and management of their property requires the right to combine as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition. And this is so, even though the *rates* provided for in the agreement may for the time be not more than are *reasonable.* They may easily and at any time be increased. It is the *combination of these large and powerful corporations* covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit."

In view of these carefully measured statements of Mr. Justice Peckham in the Trans-Missouri Case and in the Joint Traffic Case, and in view of his express statement that "the act is to have a reasonable construction," it is difficult to understand the criticism that has been made upon the language of Mr. Chief Justice White in the recent decisions in the Standard Oil and Tobacco Cases, to the effect that the statute is to be interpreted by the "light of reason."

Furthermore, in the case of the *Northern Securities Company,* 193 U. S. 197, which, as will be remembered, was a case dealing with the question of restraining trade and commerce between competing railroads, by the device of a holding company, holding a majority of the stock of the two competing companies, the court

divided five to four on the question of the illegality of such a holding company, but Mr. Justice Brewer took occasion to say, in concurring with the majority, that he wished to modify his concurrence in the opinion of Mr. Justice Peckham in the Trans-Missouri Case, so far as that opinion stated that "every" contract or combination in restraint of trade was within the statute, whether "reasonable or unreasonable." As Mr. Justice Brewer was one of the five justices whose concurrence made up the majority necessary to a decision in the Trans-Missouri Case, his expression of opinion in the Northern Securities Case made the unfortunate *obiter dictum* of Mr. Justice Peckham the *dictum* of a *minority* instead of a majority of the court and deprived it of any binding authority in subsequent cases.

Mr. Justice Brewer, in his opinion in the Northern Securities Case, said (193 U. S. 361):

"I think that in some respects the reasons given for the judgments cannot be sustained. Instead of holding that the Anti-Trust Act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was leveled at only unlawful restraints and monopolies.

"Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were *reasonable* and fit to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, *unreasonable* and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear and such a departure was not intended."

He further says (at p. 364):

"I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts and invite unnecessary litigation."

In view of these emphatic statements of Mr. Justice Brewer, one of the majority in the Trans-Missouri Case, in which he expressly repudiates the "reasonable or unreasonable" *dictum,* it is difficult to understand how any one can assert that that *dictum* is binding in subsequent cases on the principle of *stare decisis,* or that to call that *dictum* in question is sacrilege.

The situation after the Northern Securities Case was thus forcibly put by the Hon. Simeon E. Baldwin, the present Governor of Connecticut, at the time Chief Justice of that state, in 1904, in his work on "American Railroad Law," on page 16 of the first edition, in a footnote:

"That the phrase 'agreements in restraint of trade' was adopted by the framers of the Sherman Act, supposing that it would be given the same construction accepted by the English courts, see George F. Hoar's 'Autobiography,' II, 364. Mr. Justice Brewer, by whose concurrence in the judgment the decision mentioned in the preceding note (viz., the Northern Securities Co. Case) was reached, in his opinion approves such a construction as will make the act applicable only to unreasonable contracts and combinations which are in direct restraint of trade."

Judge Baldwin then adds:

*"It seems probable that this will ultimately be the prevailing view."*

A brief résumé will be needful of the other decisions of the Supreme Court intermediate between the Trans-Missouri and Joint Traffic Cases and the latest cases of the Standard Oil and the Tobacco Companies bearing on the interpretation and application of the Sherman Law to mercantile and manufacturing combinations and contracts.

Two cases decided at the same term of court as the Trans-Missouri and Joint Traffic Cases, U. S. *vs.* Hopkins, 171 U. S. 579, and U. S. *vs.* Anderson, 171 U. S. 604, were decided in favor of the defendants, the opinions in both of these cases being delivered by Mr. Justice Peckham—the same judge who had delivered the opinions in the Trans-Missouri and Joint Traffic Cases.

In the opinion in the Hopkins Case, Mr. Justice Peckham reiterates the statement that the statute must have a "reasonable construction," and repeats what he had said in the Traffic Cases:

"The Act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it" (171 U. S. 600).

The famous *Addyston Pipe* Case, 175 U. S. 211, involved an agreement between a number of rival and competing manufacturers to the effect that there should be *no conpetition* between them in certain states and territories. It was held that the "*direct, immediate and intended effect*" of the agreement was the "*enhancement*" *of the* "*price.*"

The agreement contemplated "fake" bids by the rival competitors and fixing the price at which one of the competitors could obtain the contract desired and below which none of the parties to the agreement was allowed to bid. The agreement would have been held to be against public policy and illegal at common law.

This *Addyston* contract was so flagrantly a violation not only of the letter, but of the spirit of the Sherman Act that it is difficult to conceive of any combination or conspiracy which could be brought within the act if that contract were held not to be within it.

In the very careful, able and elaborate opinion delivered by Judge Taft in this case in the U. S. Circuit Court of Appeals (85 Fed. Rep. 271), the authorities on "restraint of trade" at common law are exhaustively reviewed and the distinction is clearly pointed out between valid and invalid contracts "in restraint of trade."

At p. 282, Judge Taft says:

"In Horner *vs.* Graves, 7 Bing. 735, Chief Justice Tindal, who seems to be regarded as the highest judicial authority on this branch of the law (see Lord Macnaghten's judgment in

Nordenfelt *vs.* Maxim Nordenfelt Co. [1894] App. Cas. 535, 567) used the following language: 'We do not see how a better test can be applied to the question whether this is or not a *reasonable restraint of trade* than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public.'"

The case of Montague *vs.* Lowry, 193 U. S. 38, was a case where there was a combination of wholesale dealers in tiles, mantels and grates, who conspired to confine the business in California to the members of the combination, by *refusing to sell or deliver* tiles, grates or mantels to any other party in California and who conspired to *raise the prices* of those articles in the California market. The combination was one which would have been illegal at common law as against public policy.

The case of Swift & Co. *vs.* U. S., 196 U. S. 375, involved *a combination of independent meat dealers,* who agreed not to *bid against each other* in the live stock markets, to *bid up prices for a few days* in order to induce shipments to the stock yards, to *fix selling prices* and to that end to *restrict shipments* of meat when necessary, to establish a uniform rule of credit to dealers, *and to keep a black list,* to make *uniform and improper charges for carriage, and to secure less than lawful freight rates to the exclusion of competitors.*

Assuming that that was a case of interstate commerce within the meaning of the Sherman Law, as was held by the court, it would be difficult to conceive of any element of a combination for unlawful restraint of trade or of an attempt to monopolize which was lacking in the *Swift* Case.

The case of Chattanooga Foundry *vs.* Atlanta, 203 U. S. 390, was a sequel of the *Addyston Pipe* Case, the action being brought by the city of Atlanta against two of the members of the trust or combination which had been held unlawful in the *Addyston* Case. The only questions really discussed by the court in that case were as to the right of the city to maintain the action and as to the statute or limitations of Tennessee.

In the case of Shawnee Compress Company *vs.* Anderson, 209 U. S. 423, an agreement of lease had been held by the

Supreme Court of the territory of Oklahoma to be void as an unreasonable restraint of trade and as against public policy.

In the case the lessor company had agreed with the lessee company not only to go out of the field of competition and not to enter that field again, but had further agreed *"to render every assistance to prevent others from entering it."* There were other facts in the case showing that the lease was in aid of a scheme of monopoly on the part of the lessee company, the Gulf Compress Company. It was shown that the lessee company was in the business of leasing and operating competing compresses for the purpose of monopolizing as far as possible the business of compressing cotton in a large portion, if not all, of the cotton raising districts of the United States, and that the lease was procured from the Shawnee Company in pursuance of said scheme, and other leases of other compressors were also secured for like purposes "and that it is the design of the Gulf Compress Company to *increase the charge of compressing cotton."*

In the lease the Shawnee Company had agreed not only to refrain from competition, but to *"render the 'Gulf Company' every assistance in discouraging unreasonable and unnecessary competition."* It further appeared from the evidence that the Gulf Company had announced in a letter to the Shawnee Company in effect its purpose to create as far as possible a monopoly of the compressing business (page 433). It further appeared (page 434) that the "Gulf Company was a close corporation which, starting in Alabama, rapidly extended from Alabama to all the cotton growing territory."

The court recognized the principle announced in the *Trans-Missouri* and *Joint Traffic* Cases, "That the sale of the good will of a business with an accompanying agreement not to engage in a similar business was not a restraint of trade within the meaning of the Sherman Act." The court said:

"The principle is well understood. The restraint upon one of the parties must not be greater than protection to the other party requires, and it needs no further explanation than is given in Gibbs *vs.* Baltimore Gas Co., 130 U. S. 396. The Supreme Court of the territory recognized the principle, but said:

'Tested by the general principles applicable to contracts of this character, *this agreement is far more extensive* in its outlook and more onerous in its intention *than is necessary to afford a fair protection to the lessee.*'"

The case of Continental Wallpaper Co. *vs.* Voight Sons, 212 U. S. 227, was a case of an agreement between a number of manufacturers who organized a *selling company* through which their *entire output was sold to such persons only as would enter into a purchasing agreement by which their sales were restricted.* It was held that the clear effect of this arrangement was to restrain and monopolize. The agreement provided for selling to jobbers for the account of the Continental Wallpaper Company *at particular specified prices,* with particular discounts. The company was a selling company, organized *to control all the selling business* of the manufacturing wallpaper corporations, partnerships and persons who owned the stock of the Continental Wallpaper Company and who made separate contracts with that corporation giving it entire control of the selling business of the manufacturers. The illegality of this arrangement seemed to the court too clear for discussion, and was not in fact discussed by the court, the only question discussed and decided being whether a purchaser of goods at the stipulated prices could avoid payment on the ground that the vendor company was an illegal combination.

In each and all of the cases which the court held to be obnoxious to the Sherman Act the contracts or combinations were clearly in "unreasonable" or "undue" restraint of trade, and would have been illegal at common law.

On the other hand, in Cincinnati Packet Company *vs.* Bay, 200 U. S. 179, it is said by Mr. Justice Holmes at page 184, in upholding a covenant not to compete made in connection with a sale:

"It is argued, to be sure, that the last mentioned convenant is independent and not connected with the sale of the vessels. The contrary is manifested as a matter of good sense, and is proved even technically by the words 'it is also agreed as a part of the consideration of this agreement.' *By these words the*

*covenant not to do business* between Cincinnati and Portsmouth for five years is *imported into the sale* of the ships, and made one of the conventional inducements of the purchase. *The price is paid not for the vessels alone, but for the vessels with the covenant.* So, still more clearly, the parallel installments for five years are paid for the covenant, at least in part. It is said that there is no sale of good will. But the covenant makes the sale.

"Presumably all that there was to sell, beside certain instruments of competition, was the competition itself, and the purchasers did not want the vendors' names.

"This being our view of the covenant in question, whatever differences of opinion there may have been with regard to the scope of the Act of July 2, 1890, there has been *no intimation from any one,* we believe, *that such a contract, made as part of the sale of a business* and not as a device to control commerce, *would fall within the act.* On the contrary, it has been *suggested repeatedly* that *such a contract is not within the letter or spirit of the statute* (United States *vs.* Trans-Missouri Freight Association, 166 U. S. 290, 329, United States *vs.* Joint Traffic Association, 171 U. S. 505, 568), and it was so decided in the case of a patent, Bement *vs.* National Harrow Co., 186 U. S. 70, 92. It would accomplish no public purpose, but simply would provide a loophole of escape to persons inclined to elude performance of their undertakings if the sale of a business and temporary withdrawal of the seller necessary in order to give the sale effect were to be declared illegal in every case where a nice scrutiny could discover that the covenant possibly might reach beyond the state line. We are of opinion that the agreement before us is not made illegal by either of the provisions thus far discussed."

Coming now to a consideration of the recent decisions of the Supreme Court in the Standard Oil Case and in the Tobacco Case, I submit that the opinions in these cases are in consonance with and not a repudiation of the previous decisions of the court, so far as they distinguish between "reasonable" and "unreasonable" contracts.

In discussing these decisions I wish to once more point out, as I have already stated, that while I regard the opinions of the court, so far as they discuss the construction of the statute, as correct expositions of the meaning and intent of the statute, I do not wish to be understood as concurring in the conclusion

of the court as to the facts of the case or as to the application of the statute to the American Tobacco Company or the Imperial Tobacco Company of Great Britain and Ireland, the latter of which companies I represented on the argument in the Supreme Court.

The opinions of Mr. Chief Justice White do not, in fact, use the word *unreasonable* in defining the class of contracts prohibited by the statute, but substitute for that word the word "*undue*" or "*unduly.*" The Chief Justice would have been justified by the previous decisions of the courts in using the term "unreasonable." The test, however, as actually laid down by the Chief Justice in his opinions in those cases and concurred in by all the justices except Mr. Justice Harlan, is that contracts are within the statute which *unduly* restrain trade.

It is quite true that this word apparently interjects into the statute a test which the statute itself does not apply. The statute says every contract in restraint of trade. The court says every contract in undue restraint of trade. By the insertion of this word undue or unduly, however, the statute is made logical, reasonable and enforceable. It is quite true that the test of what is a due or an undue restraint of trade is left an open question which the court must decide in each case as it comes up, upon the facts and circumstances of that case, but the same is true of a vast number of other matters which are the subject of litigation. Where a hard and fast rule cannot be applied, then it is necessary that discretion should be allowed to the courts in determining between what is lawful and what is unlawful, what permissible and what not permissible.

Just what did the Supreme Court hold in the Standard Oil and Tobacco Cases? And just how would the law read if these opinions were set aside by legislation? Let us test the logic of those who criticise these opinions as judicial legislation by making them read as the critics would have them read.

In the Standard Oil opinion, Mr. Chief Justice White says that the statute "evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not *unduly* restrain interstate or

foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an *undue restraint.*"

And again, the Chief Justice, referring to the second section of the act, which prohibits monopolizing, says: "The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an *undue restraint of the course of trade,* all came to be spoken of as, and to be indeed synonymous with restraint of trade."

And again he says that the purpose of the statute "was to prevent *undue restraint* of every kind or nature."

And again, speaking of the remedies to be awarded by the court, he says: "The fact must not be overlooked that injury to the public by the prevention of an *undue restraint* on, or the monopolization of trade or commerce is *the foundation upon which the prohibitions of the statute rest,* and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property."

In the Tobacco Case, the Chief Justice says: "It was held in the Standard Oil Case that as the words restraint of trade at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by *unduly restricting competition* or *unduly obstructing the due course of trade* or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., *injuriously restrained trade,* that the words as used in the statute were designed to have and did have but a like significance."

Now, let us eliminate the word *unduly* and substitute *duly* and see how the statute would read: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint

of trade or commerce (even though it *duly* restrains such trade or commerce) among the several states or with foreign nations, is hereby declared to be illegal."

The absurdity of any such statutory declaration is manifest.

The Chief Justice applies the "rule of reason" to the statute and holds that the statute is to have a "reasonable construction," but in so doing, he simply follows the decision of the court in the Trans-Missouri Case and quotes the exact language of Mr. Justice Peckham in his opinion in that case.

Surely the most extreme champion of literal construction of this act, would hardly venture to amend the act, so as to read: "This act shall *not* have a reasonable construction—shall *not* be subject to the 'rule of reason' and shall *not* be interpreted by the 'light of reason.'"

It is urged that this leaves the law uncertain. True; but uncertainty is better than the ghastly certainty of business chaos, which would assuredly result if the law should be enforced according to its language as invalidating and penalizing every combination in actual restraint of trade. Verily, "the letter killeth" in this case.

Let us try to understand what literal interpretation and enforcement would mean in practice. It is difficult to arrive at a conclusion on this subject, since the most ultra-radical of the supporters of a literal interpretation are staggered when presented by concrete instances. Take, for example, the most common case of a contract in restraint of trade, that is to say, of a contract in restraint of competition, namely, a partnership. Two individual dry-goods merchants, competing with each other in interstate business, that is to say, in selling and shipping goods to the various states of the union, combine and form a firm. Thereby competition is *pro tanto* eliminated. It is at once protested, of course, that that is not a violation of the Sherman Law. But why not? I have yet to hear any satisfactory answer to this question. It is certainly a contract and a combination. It is certainly in restraint of competition, and, therefore, in restraint of trade. If the statute is to be literally and impartially and thoroughly enforced, then every partnership

between individuals engaged in interstate commerce must be enjoined.

So, when several individual competing manufacturers or traders carrying on interstate commerce unite to form a corporation, why is that not a combination in restraint of competition—that is to say, in restraint of trade? I have yet to hear any intelligible answer to this question. If the statute is to be equally and impartially enforced according to its letter, then every corporation whose stockholders formerly competed in interstate business must be enjoined, and this, of course, would cover a vast proportion of the manufacturing corporations in the United States.

*A fortiori* would this be true, where two or more corporations unite to form a third, to whom their properties are transferred, or where one corporation sells its business to another and agrees to go out of business itself.

A thousand similar instances can be suggested as to which the statute if literally construed would apply. What is said by the advocates of a literal interpretation to these instances? What tests do they lay down to discriminate between the cases where the law should be enforced and the cases where it should not be enforced? I have yet to hear any satisfactory answer to this question. Of course, the test cannot be the magnitude of the interests involved—since that at once makes a basis of discrimination based upon considerations on which the judgment of courts may differ and *ipso facto* makes the law uncertain which they say ought to be certain and not subject to judicial discrimination.

The truth is, and there is no logical escape from the conclusion, that a literal interpretation and an impartial enforcement of the statute would stop the wheels of industry and would paralyze trade.

As President Roosevelt forcibly put the situation: "It is a public evil to have on the statute books a law incapable of full enforcement, because both judges and juries realize that its full enforcement would destroy the business of the country." (Annual Message to Congress, 2d Session, 59th Congress.)

I cannot believe that if the American people with their hard-headed common sense and sense of justice really understood what is meant by the clamor for a literal interpretation and enforcement of the law, they would tolerate it for a moment. Even on the lowest plane of self-interest, they would object to having the law applied to the thousands of combinations of small capital throughout the country. They may enjoy the slaughter of the Philistines; but they can hardly fall in love with suicide.

The law as interpreted by the Supreme Court has been sufficiently effective to catch some of the biggest fishes, the Beef Trust, the Standard Oil and the American Tobacco Company. The little fishes may well be allowed to escape through the meshes of the net.

After all, the whole basis of our Anglo-Saxon jurisprudence rests upon the discretion and discrimination of the courts, who work out for the community the rules of public policy guided by the light of reason. Better far the discretion of the courts than the discretion of the executive.

I have thus far considered the statute in its civil aspect, as affecting the right of the courts to apply remedies at law or in equity. When we come to consider the law in its criminal aspect, we find ourselves confronted by a somewhat different and very serious situation.

Public opinion appears now to be clamoring for victims. It is not satisfied with damages or injunctions or possible receiverships, but punishment of individuals is loudly called for. Protests are even made against mere pecuniary fines. Actual imprisonment of the offenders is demanded. "Thumbs down" appears to be the state of mind of the spectators of the conflict between the government and the so-called "trust magnates." This state of mind is largely because of resentment at the results accomplished by the combinations and the power which they have acquired, rather than because of "righteous indignation" at the methods pursued in accomplishing the results or acquiring the power. The anger excited by the "swollen fortunes" of the multi-millionaires has much to do with this state

of mind. We are in danger of losing our heads and of plunging into a crusade of vindictive attacks, not only upon capital, but upon capitalists. We are in danger of forgetting that even the rich man has rights which cannot be wantonly disregarded without danger to the poor man.

For myself, and at the risk of being out of accord with the present state of public sentiment, I do not hesitate to say, as I have said before in discussing this statute on public occasions, that the sweeping penal provisions of this law are unwise and unjust, and should be made more limited in their scope and much more definite and certain.

Penal statutes involving personal punishment which are not based on moral distinctions are wrong in principle. To punish by imprisonment a man who has violated a prohibitory statute by performing an act which is *malum prohibitum,* but not *malum in se,* shocks the sense of justice. Of course, there are certain *mala prohibita* which are so clearly definable that personal punishment for a wanton disregard of them is appropriate; but such instances are exceptional. Where, however, the act which is *malum prohibitum* is not precisely defined, but is covered only by such general language as "restraint of trade," personal punishment is unfair and unjust.

Restraint of trade is not *per se* an immoral act, nor is a contract or combination in restraint of trade *per se* an immoral transaction. Its morality or immorality depends upon the accompanying circumstances.

There may be and frequently are acts of moral turpitude committed in the creation or in the conduct of combinations in restraint of trade. Such acts of moral turpitude, if properly defined in advance, may well be made criminal.

Such acts of moral turpitude are, for instance, the use of unfair means to suppress competition and to crush out rivals, and agreements with competitors to raise prices or to restrict production.

To make "restraint of trade" criminal, irrespective of its character and purposes and irrespective of the methods pursued

to accomplish the restraint, is to punish alike the intentional malefactor and the honorable and upright business man who has been guilty only of a technical violation of a prohibitory law. Especially is this true if the literal constructionists be taken at their word. If every contract or combination in restraint of trade is criminal, then as we have already seen the most ordinary and usual and hitherto innocent transactions may land a man in jail. Sales of business and good will, partnership agreements, formation of corporations between competitors in interstate commerce, all are illegal if the law be strictly enforced, and if the test of reasonableness or unreasonableness be not applied. There is absolutely no escape from this conclusion if the critics of the recent decisions of the Supreme Court were to have their way. The entire business community would be practically under the ban of the law and the jails of this country would not suffice to hold the criminals. No wonder that President Roosevelt said, with his customary vigor of language and force of expression:

"It is profoundly immoral to put or keep on the statute books a law, nominally in the interest of public morality, that really puts a premium upon public immorality, by undertaking to forbid honest men from doing what must be done under modern business conditions, so that the law itself provides that its own infraction must be the condition precedent upon business success."

(President Roosevelt's Annual Message to the 1st Session of 60th Congress.)

The only escape from this condemnation of the penal features of this law is to apply the very test of reasonableness which the Supreme Court, as we have seen, has applied, not only in its latest decisions which have been so fiercely attacked by the literal constructionists, but in the Trans-Missouri and Joint Traffic Cases themselves.

So far as I can recall, the criminal features of the act have not yet come before the Supreme Court, except incidentally, as for instance, on the question of the right to examine corporate

books before a Grand Jury and the application of the statute of limitations. What that court will hold when the criminal provisions of the Sherman Act shall come squarely before it, on an appeal from an actual conviction of an individual defendant indicted for "restraint of trade" is a debatable question.

It has been very forcibly urged that the statute, while sufficiently definite to support a civil suit, at law or in equity, is altogether too vague and indefinite to support a criminal indictment. The absence of all definition of what constitutes restraint of trade or monopolization would seem to leave to the arbitrary decision of a petit jury what acts should be criminally punished.

Here, again, however, we find the recent decisions of the Supreme Court to be clarifying in that they have supplied a distinction between what are legal and what are illegal restraints of trade and to that extent have made the statute more definite and certain. Not *all* contracts or combinations in restraint of trade, but only those in *undue* restraint of trade are criminal. True, it must be left to the jury to say what is a *due* and what is an *undue* restraint of trade. Nevertheless some test is laid down and the jury must exercise the same function as in many other cases where under proper instructions from the court, they are called on to pass in criminal as well as civil cases upon questions of due care or undue recklessness or negligence, or other similar questions.

The probabilities are that in view of its previous decisions on the questions heretofore submitted to it, the Supreme Court will uphold the penal provisions, if the indictment be sufficiently specific as to the overt acts and if the jury be properly instructed as to the necessity of finding that the "restraint" was "unreasonable" or "undue."

But whether the Supreme Court does or does not uphold the criminal provisions as sufficiently definite to be enforced, I submit that it is unwise and unjust and fraught with danger to individuals engaged in business enterprises to leave the penal provisions in such general language and covering acts not *per se* immoral. The criminal provisions should be amended so as to

be made more specific and so as to bring within their scope only acts involving moral turpitude and clearly definable.

There are three evils to be apprehended from combinations in restraint of trade and from monopolization:

1. Crushing out of competitors.
2. Increase of prices to consumers.
3. Decrease of prices to producers of raw material.

So far as any one of these evils is the result of unfair business methods, such unfair business methods are not only matters for civil cognizance, but may properly be remedied by penal statutes, which shall prescribe punishment to the offenders. Furthermore, any agreement or combination which has for its direct and immediate object the crushing out of competition or the increase of prices to consumers or the lowering of prices to producers may be regarded as *per se* immoral and may well be made not only illegal, but punishable criminally.

Various suggestions have been made looking toward other amendatory legislation.

Certain ultra-radical champions of the anti-trust campaign are clamorous to overrule by new legislation, the "rule of reason" decisions of the Supreme Court in the Standard Oil and the Tobacco Cases. It is difficult to perceive how such legislation can be accomplished.

A proposition to enact that the statute shall *not* have a reasonable construction and shall *not* be interpreted by the "light of reason" is, as I have already pointed out, a proposition that can hardly commend itself to even the most radical of the critics of the Supreme Court.

A proposition to insert in the statute the words "reasonable or unreasonable" so that the statute should read "every contract or combination in restraint of trade whether reasonable or unreasonable shall be illegal," seems to be equally unthinkable. It is claimed that the Supreme Court has judicially legislated so as to insert the word "unreasonable" into the act. As a matter of fact, as I have already pointed out at some length, the court uses the word "undue" or "unduly," so that to meet the decision of the court, the statute would have to be amended

so as to read "every contract or combination in restraint of trade, whether reasonable or unreasonable, whether in *due* restraint or in *undue* restraint of trade shall be illegal." A statute reading in this language would be on its face, I submit, a contradiction in terms. A "due restraint" cannot be an "illegal restraint."

Another suggestion for amendment of the statute, has the weight of the authority of the former President of the United States, who in his last annual message to Congress said: "I strongly advocate that instead of an unwise effort to prohibit *all* combinations, there shall be substituted a law which shall expressly permit combinations which are in the interest of the public, but shall at the same time give to some agency of the National Government full power of control and supervision over them."

This was in accordance with his often expressed division of trusts into "good trusts" and "bad trusts." According to President Roosevelt's scheme, as advocated in his message, this power of "control and supervision" was to be exercised "not by judicial, but by executive action, to prevent or put a stop to every form of improper favoritism, or other wrong-doing."

This idea of federal control by executive action has been carried further and made more explicit by others who have advocated a federal license for corporations doing an interstate business, which license should be revocable in case of wrong-doing by any such corporation or in case of a practical monopoly acquired by such corporation, by control of the whole or the greater part of any class of trade or commerce.

All these schemes for control by executive action, whether permissive or prohibitive, whether exercised by the President or by any subordinate authority, are, I submit, repugnant to our American traditions and principles. It has always been our boast that no one should be condemned except by the courts, after an opportunity to be heard and upon competent testimony. The Supreme Court said in Garfield *vs.* Goldsby, 211 U. S. 262: "As has been affirmed by this court in former decisions, there is

no place in our constitutional system for the exercise of arbitrary power." It seems to me incredible that the American people should consent to have their acts approved or condemned and their property rights and their business rights licensed or outlawed by executive mandate.

If this is to become a government by executive edict or by bureaucratic domination, the days of Republican institutions are certainly numbered. I for one am not prepared to admit that we are reduced to this extremity.

Another suggestion has been recently exploited and has the support of able advocates, namely, the creation by the federal government of a commission or a number of commissions who shall have power to regulate prices of articles of interstate commerce. This suggestion has been approved and advocated by some of the "trust magnates" themselves. It has even received the tentative approval of the Attorney-General in a recent public address as a scheme inviting consideration, though it has not received his definite approval or endorsement.

To my mind, this is, with all due deference to its able advocates, an appalling suggestion. The imagination is staggered when one undertakes to think out soberly and calmly what the suggestion means. Articles of interstate commerce include all articles dealt in throughout the United States—the power to fix prices means the power of life and death to the various industries engaged in trade and commerce. Not only that, but it means the right to control the prices of the necessaries of life to the "ultimate consumer." What the average American and his wife and children shall eat and drink and wherewithal they shall be clothed depend upon the prices to be paid for such necessaries of life.

To confer such a power upon any body of men, however wise and however incorruptible, seems to me, as I have already said, appalling. Nothing short of omniscience can enable such a commission to perform its work with intelligence and with safety to the best interests of producer and consumer. The analogy of the Interstate Commerce Commission is an imperfect

analogy. That eommission has to do with a single subjeet—the regulation of railroads. The problems to be eonsidered are eomparatively simple; there are eertain general principles common to all railroads whieh ean be applied to the subjeet. Besides, the railroads are earrying on a publie business and are eharged with publie duties.

The regulation of priees of a thousand artieles of manufacture, affeeting the business interests of millions of produeers and the domestie affairs of millions of eonsumers is a task from whieh the boldest man may well shrink.

Even if the law of supply and demand and the regulation of priees by eompetition have broken down and if the laws against "restraint of trade" are not adequate to meet the situation—and if some remedy for the situation is neeessary—we must surely find some remedy less revolutionary than this, whieh means arbitrary power in its most objeetionable form.

I have refrained from diseussing the eeonomie questions lying baek of repressive and restrietive measures sueh as the Sherman Law. These questions are too far-reaehing and too eontroversial to be appropriate to this oeeasion. I have assumed for the purposes of this diseussion that the policy of the Sherman Law is a sound poliey and that restriction and prohibition and penalizing of great eombinations of eapital are wise and expedient.

It is open to debate whether we have not made a step baekward instead of a step forward in eivilization towards the days of the anti-engrossing statutes of three eenturies ago.

Certainly the law as it was supposed to stand before the reeent deeisions of the Supreme Court was deeidedly a step baekward. The prohibition of every eontraet in restraint of trade whether reasonable or unreasonable, whether in due or in undue restraint of trade, was clearly a step baekward and if enforeed would have put an effeetual embargo on business enterprises and would have paralyzed trade and eommeree.

Is it not time to eall a halt on further legislation against business interests and to let business adjust itself to the present law as interpreted by the Supreme Court? I am inclined to believe that the highest point of eonsolidation has been reached

in manufacturing and trading enterprises and that hereafter under the operation of natural and economic laws the tendency will be to fall apart, to separate and to segregate. However this may be, I believe that the Sherman Law as interpreted and enforced by the Supreme Court is quite adequate, so far, at least, as civil remedies are concerned, to meet any further attempts at dangerous aggregations of capital. I protest against any further experiments in drastic legislation, especially in the direction of conferring arbitrary power upon the executive branch of the federal government which will be perilous, if not fatal, to our republican institutions.